87-1340

No.

IN THE

Supreme Court of the United States

October Term, 1988

CITY OF PHILADELPHIA,

Petitioner

v.

DISTRICT COUNCIL 33, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, by EARL STOUT, as Trustee ad Litem; and EARL STOUT; ALBERT JOHNSON; FRANCES ROONEY, ROBERT LUCAS; JAMES RAWLS; DONALD GALLIMORE; EDWARD SIMPKINS; LEONARD TILGHMAN; ANN COHEN; GEORGE WROTEN; and EARL WILLIAMS, Trustees of DISTRICT COUNCIL 33 MUNICIPAL WORKERS HEALTH AND WELFARE FUND

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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4 1 PP

QUESTIONS PRESENTED

1. Where a state legislature has enacted a definitive public policy requiring the protection of the rights of the public when public employers and public employee unions negotiate labor agreements, does Section 1 of the Fourteenth Amendment require state courts to consider that policy *sua sponte*.

2. Whether the state court rules of law preventing public employer-signatories to collective bargaining agreements from contesting the illegality of their agreements, while granting that right to private parties, violates Section 1 of the Fourteenth Amendment of the United States Constitution.

3. Whether the refusal of the lower court to hear the appeal of the City, while agreeing to hear the Union's appeal on the same issue, violates Section 1 of the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

Petitioner, the City of Philadelphia, prays that a writ of certiorari issue to review a final order of the Supreme Court of Pennsylvania denying its appeal on a matter involving the duty of the courts, *sua sponte*, to enforce established public policy, thereby protecting the constitutional rights of the public, and involving the constitutional right to be heard.

OPINIONS BELOW

The basic decisions involved in this petition are the opinions and orders of the chancellor in equity, Court of Common

Pleas, Philadelphia County, which are reported in 10 Phila. 578 and 12 Phila. 311, and are annexed to this petition in Appendix E, beginning at page 14a. These opinions and orders interpreting a collective bargaining contract term against petitioner were affirmed by the state superior court, in an opinion reported at 511 A.2d 818, and annexed hereto as Appendix D, beginning on page 4a. The order of the Supreme Court of Pennsylvania denying petitioner's petition for allowance of appeal (App. B, *infra*, 2a) is not reported. The order of the Supreme Court of Pennsylvania granting the Union's appeal (App. C, *infra* 3a) is not reported. The order of the Supreme Court of Pennsylvania denying petitioner's petition for reconsideration raising federal constitutional challenges to the chancellor's orders (App. A, *infra*, 1a) is not reported.

JURISDICTION

1. The order of the Supreme Court of Pennsylvania was entered on March 9, 1987 (App. B, *infra*, 2a). A petition for reconsideration was denied on November 5, 1987 (App. A, *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) because a right, privilege or immunity was claimed under the Constitution of the United States of America and denied by the state court.

2. The federal question was raised as indicated at page 5, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Pennsylvania Constitution provides in Article 3, section 26, in relevant part:

> No bill shall be passed giving any extra compensation to any public employee, agent, or contractor, after services shall have been rendered or contract made.

3. The Public Employee Relations Act ("PERA"), Section 1101 et. seq. of Title 43, Pennsylvania Consolidated Statutes Annotated, provides in relevant part:

> Public Policy
>
> The General Assembly of the Commonwealth of Pennsylvania declares that it is the public policy of this Commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employes subject, however, to the paramount right of the citizens of this Commonwealth to keep inviolate the guarantees for their health, safety and welfare. Unresolved disputes between the public employer and its employes are injurious to the public and the General Assembly is therefore aware that adequate means must be established for minimizing them and providing for their resolution. Within the limitations imposed upon the governmental processes by these rights of the public at large and recognizing that harmonious relationships are required between the public employer and its employes, the General Assembly has determined that the overall policy may best be accomplished by (1) granting to public employes the right to organize and choose freely their representatives; (2) requiring public employers to negotiate and bargain with employe organizations representing public employes and to enter into written agreements evidencing the result of such bargaining; and (3) establishing procedures to provide for the protection of the rights of the public employe, the public employer and the public at large.

4. Section 703 of the PERA, Title 43, Pa.C.S.A. 1101.703, provides:

> The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania or the provisions of municipal home rule charters.

STATEMENT

1. In 1982, the City entered into a collective bargaining contract with District Council 33, AFSCME, ("Union") for the period July 1, 1982 to June 30, 1984. The contract included a clause, paragraph 23B, which read:

> Each full-time employee in a class or position represented by District Council #33 shall have health and welfare benefits as such benefits are presently defined (including major medical family coverage, under the Blue Cross/Blue Shield group health medical plan, with the City paying the full contribution of such benefits, to District Council 33 Health and Welfare Fund. (1975-76) (as of 1/1/81 receive $92.00 per month).

The City made payments to the Fund under this clause in the amount of $92.00 per union member per month during the contract period. In 1983, the Union filed suit in equity and a motion for preliminary injunctive relief claiming that the City had breached its obligation to pay the full amount required by paragraph 23B into the Fund.

Following trial, the chancellor ordered the City to pay the Fund $178.00 per member per month, interpreting paragraph 23B to require the City to contribute to the Fund an amount equivalent to what Blue Cross would charge to provide each union member and his or her dependents 100% coverage for all hospital, medical, and doctor bills, with no co-pay provisions, obligations, deductibles, or caps on the total amount of coverage for health and medical care (App. E, *infra*, 16a, 19a). The chancellor further interpreted paragraph 23B to vest in the union president sole discretion in matters of the scope and level

of health and welfare benefits to be provided to Union members and paid for out of public funds, without any right in the City to prior notice of decisions enlarging the scope of benefits or to audit fund expenditures (App. E, *infra*, 17-18a, 26a). Although concluding that paragraph 23B was an "extraordinarily generous" health and welfare plan and "certainly exceeds the coverage offered by other commercial or non-profit health insurance providers" and was perhaps "actuarially unsound," the chancellor refused to "substitute [his] judgment for the collective bargaining process" (App. E, *infra*, 20a). Rather, the chancellor ordered the City to make contributions to the Fund in accordance with his interpretation of paragraph 23B without regard to the amount of money actually expended or expense incurred by the Fund for health and welfare benefits (App. E, *infra*, 23-24a).

2. The City appealed to the Superior Court of Pennsylvania seeking to have the order set aside or, alternatively, modified to the extent that the order obligated the City to pay over an amount greater than actual costs paid and incurred during the relevant time period. The Superior Court affirmed the order of the lower court, rejecting the City's view of actual costs as relevant to the inquiry (App. D, *infra*, 11-12a).

3. The Supreme Court of Pennsylvania denied the City's petition for allowance of appeal without opinion (App. B, *infra*, 2a) yet granted the Union's appeal (App. C, *infra*, 3a). The City then filed a petition for reconsideration from this denial of its appeal, challenging the chancellor's order as violating public policy and the rights of the public and the City to due process and equal protection of the law (App. A, *infra*, 1a).

On November 5, 1987, the Supreme Court denied the City's petition for reconsideration. The court had previously held, in *Fraternal Order of Police v. Hickey*, 452 A.2d 1005 (1982); *Grottenthaler v. Pennsylvania State Police*, 410 A.2d 806 (1980); and *Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh*, 391 A.2d 1318 (1978), that public employers are estopped from challenging the implementation of collective bargaining contract terms on grounds of illegality after bargaining is completed.

REASONS FOR GRANTING THE PETITION

This case examines the duty of state courts to act *sua sponte* to consider a legislatively mandated public policy to protect the rights of the public in labor agreements between public employers and public employee unions. The Supreme Court of Pennsylvania and the lower courts of the state failed to act to consider the public policy, and the state supreme court denied Petitioner the opportunity to raise the public policy issue, even though the rule in Pennsylvania permits the assertion of public policy claims for the first time in the state supreme court. *Muse-Art Corp. v. City of Philadelphia*, 95 A.2d 543 (1953).

Since the political considerations inherent in the negotiations between public employers and their employee unions may result in collusive or soft negotiations to the detriment of the public, the courts must act, even independently if necessary, at least to consider if the public policy vesting rights in the public have been violated by the labor negotiations. This is particularly true when there is a definitive public policy enunciated by the legislature.

Notwithstanding the law of Pennsylvania which provides that public policy questions can be raised on appeal for the first time, the Pennsylvania Supreme Court denied Petitioner an opportunity to be heard. In addition, the state supreme court enforces a rule of law which allows parties to private agreements to contest the public policy violations and other illegalities of their agreements, but the rule denies that opportunity to public employers.

1. This petition presents a compelling reason for the Court to review the decision of the Pennsylvania Supreme Court. The constitutional issue concerns the extent of a state court's duty, *sua sponte*, to examine, at a minimum, public employer-employee collective bargaining agreements for their adherence to a pronounced public policy of protecting the rights of the public at large. This issue transcends the particular facts and circumstances of this case and implicates state court decisions in every jurisdiction where state law authorizes public sector collective bargaining, yet demands that such agreements comport with the public weal.

In derogation of a legislatively-mandated public policy to protect the "paramount rights" of the public in connection with labor contracts agreed to by public employers and employees, the order of the Pennsylvania Supreme Court denied the City, and more importantly, the citizens of the Commonwealth, a forum to review the order of inferior state courts which required the City, as public employer, to disburse public funds to a public employee union. The decisions of the state supreme court effectively denies to the public, the third party to the collective bargaining contract between the City and the union (see *Ass. of Pennsylvania St. Coll. and Univ. Faculties v. Commonwealth,* 436 A.2d 1386 (1981), a vehicle by which to have its legislatively mandated rights and interests protected. Thus, the order denies the due process guaranteed by the Fourteenth Amendment to the United States Constitution (see *Logan v. Zimmerman Brush,* 455 U.S. 422, 433-34 (1982)).

The General Assembly of the Commonwealth of Pennsylvania has declared in the PERA as the public policy of the Commonwealth that the state intends "to promote orderly and constructive relationships between all public employers and their employees, subject, however, to *the paramount rights of the citizens* of this Commonwealth to keep inviolate the guarantees for their health, safety and welfare" (see PERA, 43 Pa. C.S.A. 1101.101 (emphasis added)).

This declared legislative purpose creates an entitlement in the citizens of the Commonwealth to have their property interests protected by the courts of the Commonwealth acting, *sua sponte,* to consider and determine whether a labor contract affords such protection. *W. R. Grace & Co. v. Rubber Workers Local 759,* 461 U.S. 757 (1983); *United Paperworkers International Union v. Misco, Inc.,* 484 U.S. ___ , 108 S. Ct. 364 (1987); *Logan v. Zimmerman Brush, supra,* 455 U.S. at 430-32. *W.R. Grace & Co. v. Rubber Workers Local 759,* supra, buttresses this view: "the question of public policy is ultimately one for resolution by the courts", and if a labor contract as interpreted "violates some expicit public policy, we are obliged to refrain from enforcing it." In sum, the state courts must exercise their judicial decision-making authority to achieve the

public policy explicitly declared in PERA that the authority to bargain collectively in the public sector is subject to "the paramount right" of the citizens "to keep inviolate the guarantees for their health, safety and welfare". 461 U.S. at 766.

The Court may take judicial notice that public officials, as political beings, do not always decide policy issues with the public interest in mind. Indeed, the Pennsylvania Supreme Court has recognized this political fact:

> The public employer, whose continued existence does not depend on cost-efficient management decisions, may yield to compensation demands in excess of those to which a private employer would accede. Indeed, the former's awareness that public sector budget increases can be requested to cover negotiated salary raises may, in itself, diminish the adversarial nature of the bargaining process.

Association of Pennsylvania State Coll. and Univ. Faculties v. Commonwealth, supra, 436 A.2d at 1380.

The Court has construed the due process guarantee, consistently and on many occasions, to require that state judicial decison-making not be arbitrary or capricious, i.e. that the record provide some set of facts that could conceivably support the decision. *Thompson v. Louisville,* 362 U.S. 199 (1960). More importantly, due process requires that a court exercise and not abandon a judicial decision-making responsibility when the judiciary is required to exercise judicial power to protect and enforce rights. *Logan v. Zimmerman Brush, supra; Societe Internationale v. Rogers,* 357 U.S. 197 (1958). In *Logan* and in *Societe Internationale,* this Court read the "property" component of the Due Process Clauses of the Fifth and Fourteenth Amendment's to impose constitutional limitations upon the powers of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. *Logan,* supra, 455 U.S. at 429.

Justice Rutledge, in a dissenting opinion in *Gryger v. Berke,* 334 U.S. 728 (1947), articulates this view of the due

process guaranteed by the Fourteenth Amendment best. There, Justice Rutledge declared as follows:

> The denial of the very essence of the judicial process, which is the exercise of discretion where discretion is required, is in itself a denial of due process, not merely an error of state law of no concern to this court . . . .

Gryger, supra, 334 U.S. at 734.

Professors Rotunda, Nowak and Young, in their leading treatise on constitutional law, similarly suggest that the substantive due process guarantee, when applied to the decision of a governmental agent or agency to whom the legislature has delegated the power to make individualized determinations regarding the rights and obligations of a person, requires that the court find some facts that could conceivably show the exercise of decision-making authority, i.e., that the decision is not totally arbitrary or capricious. Rotunda, Nowak and Young, Treatise on Constitutional Law: Substance and Procedure, Vol. 2 (1986), 1987 Pocket Part., p.3-4. The authors emphasize that "due process" in this context mandates that the forum responsible for the protection of rights exercise, and not evade, the responsibility to act to consider and make a determination as to whether the decision it reaches affords the necessary protection to such rights. Rotunda, Nowak and Young, *supra* at 4.

Initially, a review of the record below demonstrates no action on the part of the Pennsylvania courts to consider and safeguard the rights of the public, and, on the contrary, indicates that the state courts abdicated their responsibility to do so. Neither the trial court's findings and conclusions nor the decision of the Pennsylvania Superior Court evince that those courts acted to address, hear and determine whether the trial court's orders protect the rights of the public.

In that the record neither contains any facts nor discloses any conceivable set of facts that demonstrate that the courts of this state considered or exercised their judicial responsibility to determine whether the order depriving the City, and in actuality the public, of public funds comported with the public policy

declared by the statute prior to requiring such disbursement (see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Absent any such facts showing judicial consideration of the rights of the public in connection with its order, the action of the Pennsylvania Supreme Court must be deemed arbitrary and capricious so as to violate the due process guaranteed by the Fourteenth Amendment. *American Ry. Express v. Kentucky*, 273 U.S. 269 (1931).

The Court can find that the Pennsylvania Supreme Court's denial of the City's application for reconsideration, without opinion, signals the state court's adherence to a state rule of law of abstaining from entertaining and considering — let alone making a judicial determination of the merits of — a claim of nonconfirmity with public policy raised by signatories to public sector collective bargaining agreements. See *Fraternal Order of Police v. Hickey, supra; Grottenthaler v. Pennsylvania State Police, supra;* and *Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, supra*. In those cases, the Pennsylvania Supreme Court consistently held that public employers may not challenge the implementation of collective bargaining contract terms on public policy grounds after the parties have completed their collective bargaining.[1]

In sum, no indication of record, nor any conceivable set of facts deducible from the record, demonstrates that the Pennsylvania state courts considered or determined whether the collective bargaining agreement protected the rights of the public, in addition to those of the public employees and public employer. This Court should grant a writ of certiorari to review whether the Pennsylvania Supreme Court order, in these circumstances, violates the due process required by the Fourteenth Amendment of the United States Constitution, in the sense of an

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1. The rule of law adopted by the Supreme Court of Pennsylvania's conflicts with that followed by the highest courts of New York, New Jersey, and Massachusetts. See, e.g., *Economico v. Village of Pelham*, 50 N.Y. 2d 120, 480 N.Y. S.2d 213, 405 N.E. 2d 694 (1980); *School Committee of Holyoke v. Larry Duprey*, 8 Mass. App. Ct. 58, 391 N.E. 2d 925 (1979); and *Ridgefield Park Education Association v. Ridgefield Park Bd. of Ed.*, 78 N.J. 144, 393 A.2d 278 (1978).

arbitrary and capricious abdication of the duty which the state legislature demanded that the courts undertake for the protection of the rights of the public at large.

2. The state supreme court has held that public employers are estopped from challenging in the courts the illegality of collective bargaining contract terms mutually agreed upon during the bargaining process, but that these issues may only be raised by non-signatory intervenors. See *Fraternal Order of Police v. Hickey, supra; Grottenthaler v. Pennsylvania State Police, supra;* and *Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, supra.* Private parties, however, have the right at any time, including in the state supreme court, to raise the defense of illegality in suits seeking enforcement of contracts. *Waychoff v. Waychoff,* 163 A. 670 (1932); *O'Brien v. O'Brien Steel Construction Company,* 271 A.2d 254 (1970); *Rothberg v. Rosenbloom;* 628 F. Supp. 746 (E.D. Pa. 1986).

In that PERA makes protection of the interest of the public at large in public sector contracts the central theme of the grant of authority to bargain collectively in the public sector, no rational basis justifies allocating the right to defend against the implementation of contract interpretations on the basis of the public/private status of signatories to the contract. The state court bases that distinction on the asserted need to preserve the integrity of the bargaining process and the harmonious relationship it was designed to foster (see *Fraternal Order of Police v. Hickey, supra*). However, this interest is not compromised in the circumstance where the public employer does not attempt to avoid duties imposed on it by the contract, but only tries to define them. The integrity of the collective bargaining process is not undermined by permitting a public party to seek a determination as to whether a contract provision or its interpretation violates public policy or law. The City secures no advantage by an interpretation of paragraph 23B which adopts actual cost to the Fund of the benefits provided as the proper measure of the City's contribution, nor does the Union suffer any detriment. Under Article 3, section 6 of the state constitution, which prohibits paying "extra compensation" to public employees, the Union's claim can only properly be for a contribution sufficient

in amount to pay for the health services and benefits it provided to its members during the 1982-1984 contract period. The legislature's explicit policy pronouncement favoring protection of the public interest is eviscerated by the court's linking of the power of judicial review to the happenstance that some citizen will discover infringements of public rights occurring during the bargaining process and have the gumption, fortitude and resources to file suit.

Policy considerations dictate that the court afford public employers the right to assert illegality defenses. Pennsylvania recognizes that a public employer's relationship to the public funds which it collects and disburses is a fiduciary one. See *Pennsylvania Labor Relations Bd. v. State College Area Sch. Dist.*, 337 A.2d 262, 264 (1975); *Schuck v. School District of Baldwin Tp.*, 146 A. 24 (1929). Therefore, the City's position as custodian of the public trust confers standing upon the City to protect the taxpayer's interest in disbursements of public funds apart from its status as the public employer party to the collective bargaining contract. By denying the City's appeal, the court has made no state remedy available, in the circumstances of this case, for vindication of the entitlement that PERA confers on the public at large, since under its prior rulings it will not itself review the contract interpretation involved for violation of law or policy, and there are no non-signatory intervenors. The procedure which the state court has chosen for promoting its view of the need to encourage good faith bargaining is impermissably severe. See *Young v. Ragen*, 337 U.S. 235 (1949); *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72 (1982). The legislative mandate that the interests of the public at large in public sector contracts be considered is not effectuated by excluding parties wishing to assert public policy objections to contract interpretations from the courtroom. Equal protection demands that the City, at least in its fiduciary capacity, have the same right to assert public policy and statutory defenses to enforcement of interpretations of contract terms as private parties. No national basis exist for the distinction being made between public and private contracts.

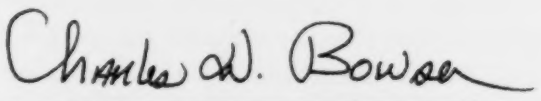
3. In issuing an order which deprives the City of the opportunity to assert illegality and public policy defenses to the enforcement of a collective bargaining agreement, the Supreme Court of Pennsylvania has adopted a position which seriously conflicts with decisions of this Court that litigants be afforded due process and equal protection of the law. *Hovey v. Elliott*, 167 U.S. 409 (1897); *Mullane v. Central Hanover Bank & Trust Co., supra; Bell v. Burson*, 402 U.S. 535 (1971).

Considerations of fundamental fairness compel the conclusion that contesting litigants, as persons similarly situated, must have parity in terms of access to the courts to be heard on their differing positions on the same issue. In this case the issues of liability and damages under paragraph 23B merged. The City never disputed liability, i.e., that monies were required to be paid by the City to the Union. The sole issue has always been, based upon the proper interpretation of the contract, how much was the City required to pay. Yet, the court granted the Union's petition for allowance of appeal and denied the City's. In so doing, the court granted the Union access to the court to argue its interpretation of the contract, while denying the City that same access. Such disparity of treatment is not justified by considerations of judicial economy or efficiency or on any other rational basis. Nothing is more repugnant to our laws than to permit one litigant to be heard, while forcing silence upon another. See *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *Kaiser Steel Corporation v. Mullins, supra*.

CONCLUSION

It is the duty of the state courts to consider, *sua sponte*, legislatively enacted public policy to protect the rights of the public in labor agreements between the public employer and the public employee. The failure of the state courts to do so, and their failure to permit the City and the public at large to be heard, violates the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted:



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APPENDIX

Appendix A

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

November 19, 1987

John M. Myers, Esquire
Chief Deputy City Solicitor
15th Floor
Municipal Services Building
Philadelphia, Pa. 19102

RE: *City of Philadelphia v. District Council 33, et al. No. 730 E.D. ALLOCATUR DOCKET 1986*

Dear Mr. Myers:

This is to advise you that the following Order has been endorsed on your Petition for Reconsideration, filed in the above captioned matter:

"November 5, 1987.

Petition Denied.

Per Curiam".

Very truly yours,

PATRICK TASSOS
Deputy Prothonotary

/ma
cc: Robert C. Daniels, Esquire

Appendix B

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

March 9, 1987

John M. Myers, Esquire
Chief Deputy City Solicitor
M S B Building, 15th Floor
Philadelphia, Pa. 19102

RE: *City of Philadelphia PETITIONER v. District Council 33, American Federation of State, County, and Municipal Employees, etc., Respondents No. 730 E. D. ALLOCATUR DOCKET 1986*

Dear Mr. Myers:

This is to advise you that on March 3, 1987 the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

Marlene F. Lachman, Esq.
Prothonotary

PATRICK TASSOS,
Deputy Prothonotary

PT: jpa
cc: Robert C. Daniels, Esquire

Appendix C

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

March 9, 1987

Robert C. Daniels, Esquire
DANIELS, SALTZ & ASSOCIATES, Ltd.
211 South Broad Street
Philadelphia, Pa. 19102

RE: *District Council 33, et al., Appellants v. City of Philadelphia No. 32 E.D. Appeal Docket 1987 (Formerly No. 647 E.D. Allocatur Docket 1986)*

Dear Mr. Daniels:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter.

"March 3, 1987

Petition Granted.

Per Curiam."

Accordingly, your appeal has been docketed as of March 9, 1987 at No. 32 E.D. APPEAL DOCKET 1987. You are further advised that Appellants' briefs and record are due for filing on April 20, 1987 and Appellee's briefs must be filed within thirty (30) days after service of the briefs for Appellant.

THE COURT WILL NOT ENTERTAIN PETITIONS FOR EXTENSIONS OF TIME EXCEPT FOR THE MOST COMPELLING REASONS. Such petitions will not be accepted for filing unless received by the Prothonotary at least two 2 weeks prior to the date on which briefs are due.

Your attention is directed to Pa. R.A.P. 2111(b) which provides that copies of the lower court opinions must be appended to the Appellant's briefs. This rule will be strictly enforced and no briefs will be accepted for filing which do not comply with this requirement.

Very truly yours,

PATRICK TASSOS
Deputy Prothonotary

/pj
cc: John M. Myers, Esquire

APPENDIX D

J. 04009/1986

DISTRICT COUNCIL 33, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL—CIO, BY EARL STOUT, AS TRUSTEE AD LITEM, AND EARL STOUT; ALBERT JOHNSON; HARRY DARGAN; GEORGE WINNS; JOHN EVERETT; LEONARD TILGHMAN; GEORGE WROTEN; EARL WILLIAMS; EDWARD SIMPKINS; EDWARD WILLIAMS; AND FRANCIS ROONEY, TRUSTEES OF DISTRICT COUNCIL 33 MUNICIPAL WORKERS HEALTH AND WELFARE FUND, *Appellants at No. 1463 & 2016 PHL 85*	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1463 Philadelphia 1985 No. 1511 Philadelphia 1985 No. 1943 Philadelphia 1985 No. 2016 Philadelphia 1985
v.	:	
CITY OF PHILADELPHIA *Appellant at No. 1511 & 1943 PHL 85*	:	

Appeal from the Orders of the Court of Common Pleas, Civil Division, of Philadelphia County at No. 3504 January Term 1983.

Before: WICKERSHAM, McEWEN and JOHNSON, JJ.

OPINION BY WICKERSHAM: J.: FILED APRIL 25, 1986

These four consolidated appeals are taken from the orders of April 26, 1985 and July 10, 1985 of the Court of Common Pleas of Philadelphia County. They arise out of a dispute between the City of Philadelphia ("the City") and District Council 33, American Federation of State, County and Municipal Employees ("District Council 33") concerning the meaning of the 1982-84 Collective Bargaining Agreement between the parties.

Trustees for the District Council 33 Municipal Workers Health and Welfare Fund ("the Fund") filed a complaint in equity and a motion for preliminary injunctive relief on January 18, 1983 against defendant-below, the City, based on allegations that the City had breached its obligation to pay certain sums of money to the Fund. A period of litigation followed which resulted in the disqualification of original counsel for District Council 33. *City of Philadelphia v. District Council 33*, 503 Pa. 498, 469 A.2d 1051 (1983). Subsequently, the chancellor issued a preliminary injunction in April, 1984 and made certain findings of fact after the initial hearing on this matter. After further trial proceedings in 1984 and 1985, the chancellor issued additional findings of fact after the final hearing in April, 1985. The City filed a timely motion for post-trial relief. On April 26, 1985. The City filed a timely motion for post-trial relief. On April 26, 1985, the court issued an order requiring the City to pay an additional $15,879,215.36 to the Fund. Both the City and District Council 33 filed timely exceptions and motions for post-trial relief. On May 24, 1985, District Council 33 filed an appeal from the order of April 26, 1985 at No. 1463 Philadelphia, 1985. The City filed a cross-appeal at No. 1511 Philadelphia, 1985. On July 10, 1985, the chancellor denied both parties motions in an opinionless order. The City subsequently filed an appeal from that order to our court at No. 1943 Philadelphia, 1985 and District Council 33 filed a cross-appeal at No. 2016 Philadelphia, 1985.

At the outset, we must determine which of the above appeals are properly before us. We conclude that the appeal and cross-appeal at Nos. 1463 and 1511 Philadelphia, 1985 were taken prematurely in that they were taken after the filing but

before the disposition of motions for post-trial relief. We therefore quash those appeals. The appeal and cross-appeal at Nos. 1943 and 2016 however, we find properly before this court. *See* Pa.R.A.P. 301. Accordingly, we now turn to the issues raised therein.[1]

Initially, we examine the claims of appellant, the City. After a thorough examination of the briefs of the parties, the relevant caselaw and the extensive record in this case, we affirm the order of the chancellor in the court below.

We begin by noting that our scope of review in such matters is closely confined. Appellate review of equity matters is limited to the determination of whether chancellor committed an error of law or abuse of discretion; a final decree in equity will not be disturbed unless it is unsupported by evidence or demonstrably capricious. *Sack v. Feinman*, 489 Pa. 152, 413 A.2d 1059 (1980), *decided after remand*, 495 Pa. 100, 432 A.2d 971 (1981); *Rosen v. Rittenhouse Towers*, 334 Pa. Super. 124, 482 A.2d 1113 (1984).

Applying this standard, we now address appellant's first issue regarding the chancellor's interpretation of the City's obligations to the Fund under the collective bargaining agreement in effect between the parties from July 1, 1982 to June 30, 1984. Appellant argues that the chancellor erred in referring to extrinsic evidence to determine the intent of the parties regarding that obligation. We disagree.

> In construing a contract, the intention of the parties is paramount and the court will adopt an interpretation which under all circumstances ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished. *Unit Vending Corp. v. Lacas*, 410 Pa. 614, 190 A.2d 298 (1963). Where the words of the contract are clear and unambiguous, the intent of the parties must be determined exclusively from the agreement itself. *Kennedy v. Erkman*, 389 Pa. 651, 133 A.2d 550 (1957). Where the language of the written contract is ambiguous, extrinsic or parol evidence may be considered to determine the intent of the parties. *In re Herr's Estate*, 400 Pa. 90, 161 A.2d 32 (1960). While courts are

responsible for deciding whether, as a matter of law, written contract terms are either clear or ambiguous; it is for the fact finder to resolve ambiguities and find the parties' intent. *Easton v. Washington County Insurance Co.*, 391 Pa. 28, 137 A.2d 332 (1957); *Castelucci v. Columbia Gas of Pennsylvania, Inc.*, 226 Pa. Super. 288, 310 A.2d 331 (1973).

> A contract will be found to be ambiguous:
>
> [I]f, and only if, it is reasonably or fairly succeptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. . . .

Ambiguities may be either patent or latent. A patent ambiguity appears on the face of the instrument and arises from the defective, obscure, or insensible language used. *Steuart v. McChesney*, 498 Pa. 45, 444 A.2d 659 (1982). Latent ambiguities rise from extraneous or collateral facts which render the meaning of a written contract uncertain although the language, on its face, appears clear and unambiguous. *Id.*

Metzger v. Clifford Realty Corp., 327 Pa. Super. 377, 385-86, 476 A.2d 1, 5 (1984) (footnote omitted). In light of the facts of this case, such a latent ambiguity existed in the clause addressing health and welfare benefits under the agreement which provided:

> 23. *HEALTH AND WELFARE PROGRAM*
>
> * * * * * *
>
> B. Each full-time employee in a class or position represented by District Council #33 shall have health and welfare benefits *as such benefits are presently defined* including major medical family coverage, under the Blue Cross/Blue Shield group health medical plan, with the City paying the full contribution of such benefits, to

> District Council 33 Health and Welfare Fund. *(1975-76)* (as of 1/1/81 receive $92.00 per month).

Agreement between the City of Philadelphia and District Council 33, AFSCME, AFL-CIO, July 1, 1982-June 30, 1984 at 23.B. [emphasis added].

The chancellor properly resolved any ambiguity as to the term "as such benefits are presently defined" by considering evidence regarding its meaning as understood by the principals to the agreement, former Mayor Frank Rizzo and Earl Stout, President of District Council 33. The chancellor concluded that based on this testimony, the ambiguous phrase should be read to have the same meaning which was attached to it by both parties. *See Demharter v. First Federal Savings and Loan Association of Pittsburgh*, 412 Pa. 142, 194 A.2d 214 (1963). *See also* Restatement of Contracts 2d, § 201(1). ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning").

Accordingly, the chancellor found that:

> 10. The City agreed to "provide 100 percent medical coverage to city employees" consistent with the 100 percent medical coverage provided by District Council 33 to its union members prior to and at the time of the contract negotiations.
>
> * * * * *
>
> 18. The Agreement requires that defendant pay over to the Health and Welfare Fund such amount of money per union member per month as it would cost to purchase a plan that would provide the same full level of health care benefits as provided by District Council 33 to its members immediately preceding the effective date of the current Agreement.

Findings of Fact, May 4, 1984 at 5 and 7.

Where a chancellor's findings are fully supported by competent evidence of record, they are binding upon a reviewing court, *Abraham v. Mihalich*, 330 Pa. Super. 378, 479 A.2d 601

(1984). We can find neither an abuse of discretion nor error of law, which would otherwise warrant our disturbing the chancellors findings on ths issue.[2]

The City next challenges the chancellor's award of damages as not calculated on a "cost" basis. Once again applying our narrow scope of review, *see Sack v. Feinman, supra, Rosen v. Rittenhouse Towers, supra,* we must conclude that the chancellor acted within his discretion in this finding and committed no error of law. At trial, expert witnesses for the City and District Council 33 presented opposing views of the proper measure of damages. After consideration of the testimony and the reports of the respective experts, the chancellor was persuaded by the opinion of the Price, Waterhouse, expert for District Council 33. The chancellor was the trier of the facts and it was his duty to resolve the conflict in the testimony. *Pirilla v. Bonucci,* 320 Pa. Super. 496, 467 A.2d 821 (1983). Because his findings are fully supported by competent evidence they are binding upon this court. *Abraham v. Mihalich, supra.*

Finally, the City contends that the chancellor erred in certain discovery rulings and in improperly shifting the burden of proof at the preliminary hearing. Regarding these matters, we once more find the chancellor committed no error of law and acted properly within his discretion. Since a trial court must oversee the ongoing discovery between the parties during the course of the litigation, it is within the court's discretion to determine the appropriate measures necessary to insure adequate and prompt discovery of mattes permitted under the Rules of Civil Procedure. *Stern v. Vic Snyder, Inc.,* 325 Pa. Super. 423, 473 A.2d 139 (1984).

In this case, the deposition testimony regarding the 1975 negotiations sought by the City was not relevant to the pending action and thus was undiscoverable under the rules. *See* Pa.R.C.P. No. 4003.1.[3] Besides, one of the proposed deponents had previously testified and been cross-examined by the City while the other testified that he had no specific recollection concerning the 1975 negotiations. Similarly, the requested records concerning operating costs of the Fund were irrelevant since the City's obligation was not governed by those costs. In

any event, sufficient evidence was provided to the City in this regard, including trustees minutes, financial audits and other records. We do not believe that the City was entitled to further discovery of these matters. We note also that the City has failed to identify any information produced at trial which was denied to it during pre-trial discovery.

Lastly, the City argues that the court improperly shifted the burden of proof from District Council 33 to the City at the commencement of the final hearing, when the court stated that its preliminary findings of fact would be taken into account. We find the City's burden of proof claim previously rebutted by our supreme court in *Lackey v. Sacoolas*, 411 Pa. 235, 191 A.2d 395 (1963), where at the final hearing of an injunction, the court properly incorporated into the record as part of the evidence to be considered, the testimony which had been presented at the preliminary hearing. Accordingly, we hold that the chancellor acted within his discretion in all respects discussed above and affirm the order of the Honorable Lawrence Prattis, dated July 10, 1985.

We now turn to District Council 33's cross-appeal which disputes the amount of the chancellor's award, despite his decision in its favor. Applying our narrow scope of review, we are obliged to conclude that the chancellor committed no abuse of discretion nor error of law by "misapplying" the testimony of Distrit Council 33's expert, a representative of Price, Waterhouse. In being persuaded by that expert's evidence, the chancellor was not required to adopt the expert's opinion verbatim in his finding of damages. The chancellor's finding regarding the amount of damages was based on all the evidence, including that adduced from the expert's testimony and is not so inconsistent with his other findings so that it should be disturbed. *See In re Estate of Billinger*, 451 Pa. 77, 301 A.2d 795 (1973).

We therefore affirm the order of the Honorable Lawrence Prattis, dated July 10, 1985 with respect to the cross-appeal as well.

Appeals at Nos. 1463 and 1511 Philadelphia, 1985 are quashed. We affirm the order of the court below with respect to appeals Nos. 1943 and 2016 Philadelphia, 1985.

Appendix E
District Council 33, AFSCME v. City of Philadelphia

Labor Law — Collective Bargaining Agreement — Municipal Employer — Health and Welfare Fund.

Equity — Constructive Trust — Preliminary Injunction — Final Adjudication.

(1) Where language in a collective bargaining agreement between a municipal employer and its employees' union created mutual obligations respecting an employee's health and welfare fund and the municipal employer failed to provide complete funding as promised, a constructive trust was imposed in favor of the union.

(2) A preliminary injunction was granted to a union entitled to a constructive trust imposed against municipal funds, whereby the amount of the municipal employer's payments to the union employees' health and welfare fund was increased as required by a collective bargaining agreement: the union having demonstrated substantial probability of success on the merits, irreparable injury if relief were not granted and that relief would preserve the status quo.

(3) A court will not substitute its judgment for the collective bargaining process.

(4) Neither court nor municipal employer may control funds disbursed to union member employees unless provided in the collective bargaining agreement.

(5) The court's power to impose a constructive trust as a preliminary injunction feature expired upon final adjudication.

(6) The court made the preliminary injunction final with a modification increasing the rate of payment per member per month from the municipal employer to the union member employees health and welfare fund based upon revised cost projections.

C.P., Phila. Co., January Term. 1983. No. 3504.

Robert C. Daniels, Esquire, for Plaintiff.

John M. Myers, Assistant City Solicitor, for Defendant.

PRATTIS, *J.*, April 4, 1985

FINDINGS OF FACT AFTER FINAL HEARING

The Court confirms the Findings of Fact adopted April 27, 1984, and incorporates them herein as Final Findings of Fact. The Court further finds:

1. The purpose of including paragraph 23(B) in the Collective Bargaining Agreement entered into between the City of Philadelphia and District Council 33 for the period extending from July 1, 1982 through June 30, 1984 was to continue to provide not less than the same level of health and medical benefits as were provided by District Council 33 to its members prior to and contemporaneous with the execution of the Collective Bargaining Agreement effective July 1982:

> Each full-time employee in a class of position represented by District Council #33 shall have health and welfare benefits *as such benefits are presently defined* including major medical family coverage, under the Blue Cross/Blue Shield group health medical plan, with the City paying the full contribution of such benefits, to District Council 33 Health and Welfare Fund (1975-76) (as of 1/1/81 receive $92.00 per month). (Emphasis added.)

2. District Council 33's claims experience with Blue Cross/Blue Shield for the fourteen and a half (14½) month period (September 1, 1981 through November 17, 1982) is the most reliable available data base upon which to base a quotation from Blue Cross for costing out the monthly monetary amount necessary to "provide 100 percent medical coverage to City employees" under a Blue Cross family rate, consistent with the 100 percent medical coverage provided by District Council 33 to its union members prior to and at the time of the inception of the 1982-84 Collective Bargaining Agreement.

3. During the period January 1, 1983 through July 30, 1984, District Council 33 undertook to provide this full coverage by payments to third party health care providers for services rendered for District Council 33 members; by the provision of health care services at the John F. Kennedy Hospital owned and operated by trustees of District Council 33, Health and Welfare

Fund. The John F. Kennedy Hospital further provided health care services to members of District Council 33 by the operation of a clinic which rendered out-patient services to District Council 33 members, beyond the coverage provided by commercial and non-profit health insurers.

4. District Council 33 undertook to pay the full balance for the cost of those medical services provided to its members and not covered by or included under the Blue Cross/Blue Shield contract between District Council 33 and Blue Cross/Blue Shield while said contract was in effect with Blue Cross/Blue Shield from September 1, 1981 through November 17, 1982, inclusive.

5. The City of Philadelphia has never requested Blue Cross to price out or prepare a cost rating for a level of health care benefits for members of District Council 33, at full 100 percent coverage for all of medical expenses including, but not limited to, 365 day in-patient hospitalization, with no co-pay provisions or obligations, no deductibles, no cap on the total amount of coverage for health and medical care for each union member and his or her dependent family members, including full and complete payment of all hospital, medical and doctor bills, as the City was obligated to provide and pay under paragraph 23(B) of the Collective Bargaining Agreement in force between the City of Philadelphia and District Council 33 for the period extending from July 1, 1982 through and including June 30, 1984.

6. District Council 33 members who were covered by the terms of the Collective Bargaining Agreement with the City of Philadelphia have incurred known claims of more than Twenty-Four Million, Three Hundred and Forty-Seven Thousand, Five Hundred and Thirty-Five ($24,347,535) Dollars for medical services for the period extending from January 1, 1983 through June 30, 1984. However, this figure does not represent all of the costs or claims for medical services provided to District Council 33 members from January 1, 1983, through June 30, 1984 because the District Council 33 computer system did not go into effect until August, 1983 and not all of the known bills for medical services incurred prior to that time have been entered into the computer.

7. Due to the Fund's inability to pay the health care providers who were and had been providing District Council 33 members with health services, hospitals in the greater Philadelphia area have refused to admit and are continuing to refuse to admit and provide hospital care and medical treatment to numerous members of District Council 33.

8. Earl Stout, as President of District Council 33, intermittently exercised his authority to make modifications enlarging the scope of benefits provided to District Council 33 union members.

9. The union's benefit booklets were not republished each time a modification was made increasing those health benefits provided to District Council 33 members.

10. The union's benefits booklet provided only the minimum of benefits actually provided to its union members and their dependents during the contract period extending from July 1, 1982 through June 30, 1984.

11. District Council 33 provided its members with "full coverage," notwithstanding certain limitations set forth in the Benefits Booklet (i.e., alcohol, drug treatment, cosmetic surgery), which were apparently not considered illnesses.

12. The administrative expenses of the Fund from January 1, 1983 through June 30, 1984 were less than four (4%) percent of the total benefits paid for by the Fund. According to the cities' expert, that figure (less than four (4%) percent) "is on a very good side of the range . . . [and the Fund] . . . is being well run at that percentage point . . . [and constitutes] good performance" by the Fund.

13. The City of Philadelphia has never obtained the right, through the collective bargaining process or otherwise, and, consequently, does not have the authority to administer, or audit the financial expenditures or affairs of District Council 33 or its Health and Welfare Fund.

14. In September, 1983, the City's contribution to the Police and Firefighters Health and Welfare Fund was $186.00

per member per month for a package of health benefits coverage, which provided a lesser level of health care benefits coverage, than that level of benefits provided by District Council 33 to its members.

15. The record before this court does not establish the extent to which the operations of the clinic and John F. Kennedy Hospital were allocated to those District Council 33 members for whom the City of Philadelphia was obligated. Accordingly, the court cannot compute the clinic cost or the hospital costs except to the extent that they are reflected in the Blue Cross-Blue Shield data base developed during the period September 1, 1981, through November 17, 1982.

16. After a review of the testimony and opinion of witnesses, and a study of the reports of the respective experts, the court is persuaded by the opinion of the plaintiffs' expert, Price, Waterhouse. The Court's preliminary order was based on a projection of cost of the Blue Cross plan which most closely approximated the coverage extended by plaintiffs. This projection resulted in the temporary order of April 27, 1984, directing the defendants to pay $122.00 per member per month during the period in question. A more detailed projection of the data relating to the same plan based upon the Price, Waterhouse report persuades the court that a more accurate estimation of the requirements of the defendant's obligation under the Collective Bargaining Agreement would be $157.00 per member per month during the period January, 1983 to June, 1983 and $188.00 per member per month during the period July, 1983 to June, 1984 or an average monthly payment during the period in controversy of $178.00 per month.

CONCLUSION

The employees of the City of Philadelphia, who are represented by the plaintiffs have designated the plaintiffs as their collective bargaining agent to work out the wages, hours, and working conditions of their contract of employment. As Mayor Goode testified, the City, as employer, made available to the employees, an aggregate sum to be divided as the employees,

through their agent, perceived their needs and priorities. Thus, the *employees* might emphasize job security over take-home pay and might, for obvious tax reasons, divide compensation into taxable earnings as reflected in the paycheck and non-taxable earnings designated for health and welfare purposes and diverted to a special trust set up and operated by the agents of the employers. In either event, the payments by the city are beneficially the money of the employees as soon as paid.

Appropriately, therefore, the employees and their agents have resisted attempts by the defendant to both pay the money and control it. Mayor Rizzo testified that it was never contemplated that the City would have any such control. While a legitimate subject for negotiation between the employees' collective bargaining agent and the City of Philadelphia; in no contract entered into from 1975 to date have the parties negotiated any provision giving the defendant City of Philadelphia audit authority, representation on the trustee board, administrative responsibilities or any control of the expenditures of the employees' money. Consequently, the court will not substitute its judgment for the collective bargaining process.

The employees who are members of District Council 33 have, through their agents, provided an extraordinarily generous health and welfare plan. It certainly exceeds the coverage customarily offered by other commercial or non-profit health insurance providers. It may be actuarially unsound. Certainly, it includes the potential that a few members with catastrophic illness may preempt the resources available in a given period of time for the general membership.

However, just as the defendant may not, unless provided in the collective bargaining agreement tell the members and their agent how to spend their money; neither may the court.

The constructive trust imposed by the court in the Order of April 27, 1984, was of necessity, a temporary device designed to assure the court that the status quo would be maintained until final adjudication. The court's power to impose such a trust expires with the final adjudication.

The court concludes, as a matter of law, that the preliminary injunction entered April 27, 1984, shall be made final: but

shall be modified to provide that the defendant City of Philadelphia pay to the plaintiff District Council 33 Health and Welfare Trust the sum of $178.00 per member per month for the period January 1, 1983 to June 30, 1984.

APPENDIX E

District Council 33, American Federation of State, County and Municipal Employees, AFL-CIO, by Earl Stout, as Trustee ad Litem, et al. v. City of Philadelphia

Labor Law — Municipal Collective Bargaining Agreement — Health and Welfare Benefits.

Civil Procedure — Preliminary Injunction — Constructive Trust.

(1) The City of Philadelphia's breach of its contractual obligation under the collective bargaining agreement with District Council 33, AFSCME, has caused union members and their families to suffer irreparable harm by being denied necessary health care services due to the union's inability to pay for required medical services for its members and their dependents.

(2) Plaintiff Union's request for a preliminary injunction increasing the city's contribution to union's health and welfare fund is granted where the union has demonstrated a substantial probability that it will succeed on the final merits of their litigation; irreparable injury will occur if preliminary injunctive relief is not granted; union is seeking preservation of the status quo; and the collective bargaining agreement creates mutual obligations under which this court should impose a constructive trust.

C.P., Phila. Co., January Term, 1983, No. 3504.

Robert C. Daniels, Esquire, for Plaintiff.

John M. Myers, Deputy City Solicitor, for Defendant.

PRATTIS *J.*, April 27, 1984

FINDINGS OF FACT

1. Since July 1, 1975, the City of Philadelphia ("City") and District Council 33, AFSCME ("Union"), have been bound by an agreement, embodied in a "Memorandum of Agreement"

(P-1), and subsequently in a Collective Bargaining Agreement (P-2), which provides in relevant part:

> Each full-time employee in a class of position represented by District Council #33 shall have health and welfare benefits *as such benefits are presently defined* including major medical family coverage, under the Blue Cross/Blue Shield group health medical plan, with the City paying the full contribution of such benefits, to District Council 33 Health and Welfare Fund. (*1975-76*) (as of 1/1/81 receive $92.00 per month). (Emphasis added.)

The phrase "benefits as presently defined", as negotiated with and agreed to by representatives of the City and Union during negotiations preceding the signing of the 1975 Agreement, was intended to provide for health and welfare benefits as then defined and provided by the Union at the time of the negotiations in February, March and April of 1975 and at the time of the inception of the Agreement on July 1, 1975 (*i.e.* 365 unlimited in-patient hospital days per year, no co-payments by union members, no deductible for the payment of any expenses and no cap on the amount of payments for any one particular illness for a union member or his dependents).

2. From July 1, 1975, through December 31, 1981, the City paid to the Fund for each employee and retiree covered by the Collective Bargaining Agreement, pursuant to Paragraphs 5 and 23(B), an amount equal to that charged by Blue Cross/Blue Shield to the City under an "A700" contract for health and welfare benefits of City employees (D-13). The A700 contract defined the health and welfare benefits for a group of City employees which, in 1975, included among others, a significant number of members of the Union. However, the City never indicated or suggested to Earl Stout or any members of Union that the 1975 Agreement provision regarding health and welfare benefits would be tied to any particular Blue Cross or Blue Shield Group or Plan. Rather, the City agreed and contractually undertook to use Blue Cross/Blue Shield as a guide with respect to pricing the cost of purchasing a health care plan which would provide the "health and welfare benefits as such benefits are

presently defined" and were being provided by District Council 33 to its union members at the time of the negotiation of that Agreement in March, April and May 1975 and at the time of its inception on July 1, 1975.

3. The Union was not required under the Collective Bargaining Agreement to purchase a Blue Cross/Blue Shield contract. The 1975 Agreement between the City of Philadelphia and Union intended that the level of benefits provided for the union members would be determined by District Council 33. The level of benefits as "such benefits are presently defined" in the 1975 Agreement referred to that level of benefits that were being provided to the union members during the negotiations between District Council 33 and the City.

4. The City's payments under Paragraphs 5 and 23(B) were consistent with its interpretation of the Agreement, as set forth in published Civil Service Regulations, amended in 1975, 1979, 1980, 1981 and 1982 (D-11), but the Civil Service Regulations unilaterally varied the obligations undertaken by the City in the Collective Bargaining Agreement.

5. Section 27.0111 of the Civil Service Regulations have described the City's obligation for health and welfare payments to be:

> For each full-time employee in a class of position represented by District Council #33, one hundred percent (100%) of the cost of family coverage including Major Medical, under the City's Blue Cross/Blue Shield group health medical plan as presently defined (7/1/75) . . .

6. By 1983, the figures provided by Blue Cross/Blue Shield were a grossly inappropriate guide under Paragraphs 5 and 23(B) because the number of city employees covered under the A700 plan was either extremely small or nonexistent. As of this date, the City's Blue Cross/Blue Shield A700 contract has been cancelled.

7. Paragraph 5 of said Memorandum of Agreement provides as follows:

> Each full-time employee in a class or position represented by District Council 33 *shall have* health and welfare benefits as such benefits are presently defined including major medical family coverage, under the Blue Cross/Blue Shield group health medical plan, with the City paying the full contribution of such benefits, to District Council 33 Health and Welfare Fund. (P-1, emphasis added).

8. Prior to and since July of 1975 and up until and including the present time, Union provided its members with full 100 percent coverage for all of their medical expenses, including, but not limited to, 365 day in-patient hospitalization, with no co-pay provisions or obligations, no deductibles, no cap on the total amount of coverage for health and medical care for each union member and his or her dependent family members, including full and complete payment of all hospital, medical and doctor bills.

9. However, the City never indicated or suggested to Earl Stout or any members of Union that the 1975 Agreement provision regarding health and welfare benefits would be tied to any particular Blue Cross or Blue Shield Group or Plan.

10. The City agreed to "provide 100 percent medical coverage to city employees" consistent with the 100 percent medical coverage provided by District Council 33 to its union members prior to and at the time of the contract negotiations.

11. Both the City and Union agreed that the Union had the exclusive right to determine the full and proper level of benefits which were to be provided to its members and the City would pay to the District Council 33 Health and Welfare Fund (Fund) a monthly sum of money based upon a rate quotation provided by Blue Cross to the City, in costing out the monthly monetary amount necessary to provide said levels of benefits.

12. It was never contemplated by the City or Union that Blue Cross would actually provide the benefits to the members of Union.

13. The City agreed that the money paid to Union pursuant to the terms of the Agreement, became the property and

responsibility of Union and that the City had no right to administer or control the Fund's money.

14. The City agreed that the Collective bargaining Agreement gave the City of Philadelphia no right to control the expenditures of the Union Health and Welfare Fund and that said right was exclusively vested with the trustees of the Fund.

15. From July 1, 1975 up to and including the present time, defendant, City of Philadelphia, and Union have entered into a series of collective bargaining agreements and/or signed and executed memorandums of agreement in ratification thereof.

16. Paragraph 5 of that original 1975-76 Agreement has remained unchanged and has been carried forward in its exact language since 1975 up through the present Agreement of 1982-1984, as paragraph 23(B) of the Collective Bargaining Agreement between Union and the City of Philadelphia.

17. From July 1, 1975 to the present, and including the period covered by the 1982-1984 Collective Bargaining Agreement involved herein, defendant's contractual obligation to pay monies over to the Health and Welfare Fund has been defined in two paragraphs of both the current agreement, and in all preceding agreements, which paragraphs read, in relevant part, as follows:

> [T]here shall be made available to each employee and to [categories of] former employee[s] . . . and paid over to the established organization or agency designated by such employee or former employee against the cost to him of an established health-medical plan: . . . Payment shall be made to the Secretary-Treasurer of District Council 33 of the American Federation of State, County and Municipal Employees, AFL-CIO (1968). (23(A))

> Each full-time employee in a class or position represented by District Council 33 shall have health and welfare benefits as such benefits are presently defined including major medical family coverage, under the Blue Cross/Blue Shield Group health medical plan, with the City paying the

full contribution of such benefits, to District Council 33 Health and Welfare Fund. (23(B))

18. The Agreement requires that defendant pay over to the Health and Welfare Fund such amount of money per union member per month as it would cost to purchase a plan that would provide the same full level of health care benefits as provided by District Council 33 to its members immediately preceding the effective date of the current Agreement.

19. As of September 1, 1981, Union applied to Blue Cross/Blue Shield for medical benefits providing union members with 365 days of in-patient hospital care, with no co-payment obligations by union members, full coverage of ancillary, semi-private room benefits, a private room, if medically necessary, certain out-patient benefits and full coverage for diagnostic and emergency treatment for medical and accidents.

20. By letter dated October 18, 1982 (P-5) Blue Cross, acting on its behalf and for Blue Shield, informed Union that for a package of health-medical benefits providing a *lesser level* of medical benefits from Blue Cross/Blue Shield of Greater Philadelphia (Plan 100) than the Union had contracted for on behalf of its members with defendant, City of Philadelphia, the monthly cost to the Health and Welfare Fund for each union member would be $122.13.

21. In said letter of October 18, 1982 (P-5), Blue Cross quoted the Union a major medical plan which was a standard One Million ($1,000,000.00) Dollar medical program which has an annual $100.00 deductible per member each year, with Blue Cross reimbursing 80 percent of the charges and the individual union member being responsible for the remaining 20 percent of the medical expense incurred; this plan also contained a $10,000.00 maximum benefit for mental health benefits.

22. The Blue Shield Plan 100 is the top program offered through Blue Shield.

23. The City *never requested a rate quotation* from Blue Cross/Blue Shield with respect to the amount of money it would cost to purchase a health care plan which would provide benefits

"as such benefits are presently defined" and as were being provided by District Council 33 to its union members.

24. The City has been paying $92.00 per union member per month for Health and Welfare benefits since July 1, 1981 and up until the present time, despite acknowledgements by members of the City administration and its counsel that more money is owed to the Fund under the terms of the 1982-1984 Collective Bargaining Agreement.

25. Even during the period that District Council 33 contracted with Blue Cross and Blue Shield, the union continued to provide its members with 100 percent medical coverage by underwriting those medical and hospital costs and expenses not covered by the Blue Cross/Blue Shield medical insurance plan in effect between DC 33 and Blue Cross/Blue Shield.

26. District Council 33 relied on the assumption that the City would fairly and honestly procure an accurate rate quotation from Blue Cross with respect to determining the amount of contribution it was obliged to make per union member per month to the Fund, pursuant to its contractual obligation so to do under the Agreement (P-1).

27. Members of Union have been denied health care and medical services and beneits because of the Union's inability to pay the bills of medical health care providers due to the City's breach of its Collective Bargaining Agreement (P-2) with Union.

28. There have been numerous lawsuits and other outstanding claims against individual members of DC 33 due to unpaid medical and hospital bills for DC 33 members (P-10).

29. Defendant's breach of its contractual obligation under the Agreement (P-2) has caused union members and their families to suffer irreparable harm by being denied necessary health care services due to the Union's inability to pay for required medical services for its members and their dependents.

30. The Court cannot determine, on the basis of the present limited record, what the proper payment under Paragraphs 5 and 23(B) should have been either in 1983 or 1984, but it is clearly not less than the $122.13 quoted to the Union in

October, 1982 as the cost for less than 100% of the then existing benefit package.

31. The Union and Fund have an obligation under Paragraphs 5 and 23(B) to use the funds received thereunder exclusively for the health and welfare benefits of persons covered by the Collective Bargaining Agreement and their dependents (221).

32. At the preliminary stage, the Court cannot determine the amount of money the Fund has expended for health and welfare benefits and other expenses on behalf of City employees for health and welfare benefits under Paragraphs 5 and 23(B) of the Collective Bargaining Agreement.

33. Although the Union produced evidence that the total claims against it, exclusive of JFK Hospital and Blue Cross/Blue Shield is approximately $11 million, it has not yet produced evidence as to the amount of valid claims asserted by health and welfare benefit providers who have rendered covered health and welfare services to persons as to whom the City of Philadelphia has an obligation under the Collective Bargaining Agreement.

34. There is, however, substantial evidence that District Council 33 will be able to establish a clear right to the relief it seeks.

CONCLUSIONS OF LAW

35. The Union has demonstrated a substantial probability that it will succeed on the final merits of this litigation.

36. The Union hs demonstrated that irreparable injury to it, the Fund, and City employees has occurred and will occur if preliminary injunctive relief is not granted.

37. The Union has established that it is seeking preservation of the status quo; to wit, provision of 100% of the cost of health and welfare benefits.

38. Paragraphs 5 and 23(B) create an obligation of the City to pay money to the Fund, subject to a condition that the fund use the money so paid *exclusively* for health and welfare benefis for persons on whose behalf the payment has been made.

39. The Union and Fund have yet to establish that they have fulfilled his condition.

40. The language of Paragraphs 5 and 23(B) creates mutual obligations under which this Court should impose a constructive trust. *Buchanan v. Brentwood Federal S & L Assn.*, 457 Pa. 13, 320 A.2d 117 (1974).

41. On the basis of the record before the Court, the Union's request for a preliminary injunction increasing the amount of the City's payment to the Fund should be granted.

ORDER

And Now, this 3rd day of May, 1984, upon due and proper notice to the defendant, and in consideration of plaintiffs' verified complaint, the motion for preliminary injunction, supporting memorandum of law, the evidence presented at the preliminary hearings in support thereof — April 6, 13 and 16, 1984, and the Findings of Fact and Conclusions of Law entered by the Court on April 27, 1984, it is hereby

ORDERED and DECREED the Defendant City of Philadelphia pay to the Plaintiff District Council 33, AFSCME Health and Welfare Fund, the sum of $122.13 per member per month as such payments are provided for in the existing Collective Bargaining Agreement; said payment to become effective the month of May, 1984 and to continue until said existing Collective Bargaining Agreement expires.

For the period of January, 1983, until and including April, 1984, the Defendant City of Philadelpia shall pay to the Plaintiff District Council 33 the difference between the sum of $92.00 per member per month, and $122.13 per member per month, as such payments are provided for in the existing Collective Bargaining Agreement, provided that such payment shall be made:

> Subject to a constructive trust for the benefit of members of District Council 33, which trust shall be discharged by payments of the claims of the third party health providers who have rendered service to said District

Council 33 members but whose agreed upon charges therefore are due and unpaid.

Defendant City of Philadelphia shall make such payments to District Council Health and Welfare Fund for payment of said providers, upon presentation to defendant of statements by the plaintiff certified to by an accountant agreed upon by the parties.

The accumulated arrearages from January, 1983 to April, 1984 shall be paid by the defendant by June 30, 1984.